9-13.000
OBTAINING EVIDENCE

9-13.100

Out of Court Identification Procedures

See the Criminal Resource Manual at 201 et seq. for a discussion of the law on lineups and showups, photographic lineups, fingerprinting, handwriting, voice exemplars and voice prints and other physical evidence issues.

9-13.200 Communications with Represented Persons -- Generally

28 C.F.R. Part 77 generally governs communications with represented persons in law enforcement investigations and proceedings. This section sets forth several additional departmental policies and procedures with regard to such communications. Both this section and 28 C.F.R. Part 77 should be consulted by Department attorneys before engaging in any communications with represented individuals or represented organizations.

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

The rules set forth in 28 C.F.R. Part 77 are intended, among other things, to clarify the circumstances under which government attorneys may communicate with represented persons. They are not intended to create any presumption that communications are necessary or advisable in the course of any particular investigation or proceeding. Whether such a communication is appropriate in a particular situation is to be determined by the government attorney (and, when appropriate, his or her supervisors) in the exercise of his or her discretion, based on the specific circumstances of the individual case.

Furthermore, the application of this section, like the application of 28 C.F.R. Part 77, is limited to communications between Department of Justice attorneys and persons known to be represented by counsel during criminal investigations and proceedings or civil law enforcement investigations and proceedings. These provisions do not apply to Department attorneys engaged in civil suits in which the United States is not acting under its police or regulatory powers. Thus, state bar rules and not these provisions will generally apply in civil suits when the government is a defendant or a claimant.

Attorneys for the government are strongly encouraged to consult with appropriate officials in the Department of Justice when the application or interpretation of 28 C.F.R. Part 77 may be doubtful or uncertain. The primary points of contact at the Department of Justice on questions regarding 28 C.F.R. Part 77 and this section are the Assistant Attorneys General of the Criminal and Civil Divisions, or their designees.

9-13.220 Communications During Investigative Stage

Section 77.7 of Title 28, Code of Federal Regulations, generally permits communications with represented persons outside the presence of counsel that are intended to obtain factual information in the course of criminal or civil law enforcement investigations before the person is arrested in a federal criminal case or is a defendant in federal civil enforcement proceeding. Such communications must, however, have a valid investigative purpose and comply with the procedures and considerations set forth below.

During the investigative stage of a case, an attorney for the government may communicate, or cause another to communicate, with any represented person, including a "target" as defined in USAM 9-13.240, concerning the subject matter of the representation if the communication is made in the course of an undercover investigation

of possible criminal or wrongful activity. Undercover communications during the investigative stage must be conducted in accordance with 28 C.F.R. Part 77 and relevant policies and procedures of the Department of Justice, as well as the guidelines for undercover operations of the federal law enforcement agency conducting the investigation (e.g., the Attorney General's Guidelines on FBI Undercover Operations).

Overt communications during the investigative stage are subject to the procedures and considerations set forth in sections 9-13.230 through 9-13.233, 9-13.240 through 9-13.242, and 9-13.250 below.

9-13.230 Overt Communications with Represented Persons

During the investigative stage of a criminal or civil enforcement matter, an attorney for the government as a general rule should communicate overtly with represented persons outside the presence of counsel only after careful consideration of whether the communication would be handled more appropriately by others. Attorneys for the government may not, however, cause law enforcement agents to make communications that the attorney would be prohibited from making personally.

28 C.F.R. § 77.8 prohibits an attorney for the government from initiating or engaging in negotiations of a plea agreement, immunity agreement, settlement, sentence, penalty or other disposition of actual or potential civil or criminal charges with a represented person without the consent of counsel. However, the attorney for the government is not prohibited from responding to questions regarding the general nature of such agreements, potential charges, potential penalties, or other subjects related to such agreements. In such situations, an attorney for the government should take care not to go beyond providing information on these and similar subjects, and generally should refer the represented person to his or her counsel for further discussion of these issues, as well as make clear that the attorney for the government will not negotiate any agreement with respect to the disposition of criminal charges, civil claims or potential charges or claims or immunity without the presence or consent of counsel.

9-13.231 Overt Communications with Represented Persons -- Presence of Witness

An attorney for the government should not meet with a represented person without at least one witness present. To the extent feasible, a contemporaneous written memorandum should be made of all communications with the represented person.

9-13.232 Overt Communications with Represented Persons -- Restrictions

When an attorney for the government communicates, or causes a law enforcement agent or other agent to communicate, with a represented person without the consent of counsel, the restrictions set forth in 28 C.F.R. §§ 77.8 and 77.9 must be observed.

9-13.233 Overt Communications -- Assurances Not to Contact Client

During the investigative stage, and absent compelling law enforcement reasons, an attorney for the government should not deliberately initiate an overt communication with a represented person outside the presence of counsel if the attorney for the government has provided explicit assurances to counsel for the represented person that no such communication will be attempted and no intervening change in circumstances justifying such communications has arisen.

9-13.240 Overt Communications with Represented Targets

Except as provided in USAM 9-13.241 or as otherwise authorized by law, an attorney for the government should not overtly communicate, or cause another to communicate overtly, with a represented person who the attorney for the government knows is a target of a federal criminal or civil enforcement investigation and who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such person. A "target" is a person as to whom the attorney for the government: (a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding. An officer or employee of an organization that is a target is not to be considered a target automatically even if such officer's or employee's conduct contributed to the commission of the crime or wrongful conduct by the target organization; likewise, an organization that employs, or employed, an officer or employee who is a target is not necessarily a target itself.

9-13.241 Overt Communications with Represented Targets -- Permissible Circumstances

An attorney for the government may communicate overtly, or cause another to communicate overtly, with a represented person who is a target of a criminal or civil law enforcement investigation concerning the subject matter of the representation if one or more of the following circumstances exist:

A. Determination if Representation Exists. The communication is to determine if the target is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

B. Discovery or Judicial Administrative Process. The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including but not limited to testimony before a grand jury or the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena, or civil investigative demand.

C. Initiation of Communication by Represented Person. The represented person initiates the communication directly with the attorney for the government or through an intermediary and, prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the represented person's right to speak through his or her attorney and/or to have the attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

D. Waivers at the Time of Arrest. The communication is made at the time of the arrest of the represented person, and he or she is advised of his or her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

E. Investigation of Additional, Different, or Ongoing Crimes or Wrongful Conduct. The communication is made in the course of an investigation of additional, different or ongoing criminal or wrongful conduct. *See* 28 C.F.R. § 77.6(e).

F. Threat to Safety or Life. The attorney for the government believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of harm; and the attorney for the government believes that the communication is reasonably necessary to protect against such risk.

G. Effective Performance of Law Enforcement Functions. The Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney: (i) determines that exceptional circumstances exist such that, after giving due regard to the importance -- as reflected in 28 C.F.R. Part 77 and this section -- of avoiding any undue interference with the attorney-client relationship, the direct communication with a represented party is necessary for effective law enforcement; and (ii) authorizes the communication. Communications with represented parties pursuant to this exception shall be limited in scope consistent with the exceptional circumstances of the case and the need for effective law enforcement.

9-13.242 Overt Communications with Represented Targets -- Organizations and Employees

Overt communication with current high-level employees of represented organizations should be made in accordance with the procedures and considerations set forth in section 9-13.241 above, in the following circumstances:

- The current high-level employee is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter of the communication; and
- The organization is a target.

Whether a person is to be considered a high-level employee "known by the government to be participating as a decision maker in the determination of the organization's legal position" is a fact-specific, case-by-case question.

9-13.250 Overt Communications During Investigative Stage -- Office Approval Procedure

Before communicating, or causing another to communicate, overtly with a target the attorney for the government knows is represented by counsel regarding the subject matter of the communication, the attorney for the government should write a memorandum describing the facts of the case and the nature of the intended communication. The memorandum should be sent to and approved by the appropriate supervisor before the communication occurs. In United States Attorney's Offices, the memorandum should be reviewed and approved by the United States Attorney.

If the circumstances of the communication are such that prior approval is not feasible, the attorney for the government should write a memorandum as soon after the communication as practicable and provide a copy of the memorandum to the appropriate supervisor. This memorandum should also set forth why it was not feasible to obtain prior approval. The provisions of this section do not apply if the communication with the represented target is made at the time of arrest pursuant to section 9-13.241(d).

9-13.260 Enforcement of the Policies

Appropriate administrative action may be initiated by Department officials against government attorneys who violate the policies regarding communication with represented persons.

9-13.300 Polygraphs -- Department Policy

The Department opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage for the following reasons.

Though certain physiological reactions such as a fast heart beat, muscle contraction, and sweaty palms are believed to be associated with deception attempts, they do not, by themselves, indicate deceit. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment can also produce these same physiological reactions. S. Rep. No. 284, 100th Cong., 2d Sess. 3-5 (1988). Moreover, an individual is less likely to produce these physiological reactions if he is assured that the results of the examination will not be disclosed without his approval. Given the present theoretical and practical deficiencies of polygraphs, the government takes the position that polygraph results should not be introduced into evidence at trial. On the other hand, in respect to its use as an investigatory tool, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. *E.g.*, R. Ferguson, Polygraph Policy Model for Law Enforcement, *FBI Law Enforcement Bulletin*, pages 6-20 (June 1987). The case agent or prosecutor should make clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. If the subject is in custody, the test should be preceded by Miranda warnings. Subsequent admissions or confessions will then be admissible if the trial court determines that the statements were voluntary. *Wyrick v. Fields*, 459 U.S. 42 (1982); *Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975).

See the Criminal Resource Manual at 259 et seq. for a discussion of case law on polygraph examinations.

9-13.400 News Media Subpoenas -- Subpoenas for News Media Telephone Toll Records -- Interrogation, Indictment, or Arrest of Members of the News Media

Procedures and standards regarding the issuance of subpoenas to members of the news media, subpoenas for the telephone toll records of members of the news media, and the interrogation, indictment, or arrest of members of the news media are set forth in 28 C.F.R. § 50.10.

It is the Department's policy to protect freedom of the press, the news gathering function, and news media sources. Therefore, all attorneys contemplating the issuance of such subpoenas, the interrogation of a member of the new media, or the initiation of criminal proceedings against a member of the news media should be aware of the requirements of 28 C.F.R. § 50.10.

Except in cases involving exigent circumstances, such as where immediate action is required to avoid the loss of life or the compromise of a security interest, the express approval of the Attorney General is necessary prior to the interrogation, indictment, or arrest of a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media. The Attorney General's authorization is also required before issuance of any subpoena to a member of the news media, except in those cases where both a media representative agrees to provide the material sought *and* that material has been published or broadcast. In addition, the Attorney General's permission is required before the issuance of a subpoena for the telephone toll records of a member of the news media. Failure to obtain the prior approval of the Attorney General, when required, may constitute grounds for disciplinary action.

Whenever the government seeks the Attorney General's authorization pursuant to 28 C.F.R. § 50.10 in a case or matter under the supervision of the Criminal Division, the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations should be contacted at (202) 514-0856. A memorandum or letter requesting Attorney General authorization should summarize the facts of the prosecution/investigation and describe attempts to obtain the voluntary cooperation of the news media through negotiation. Specifically address and elaborate regarding those factors listed at 28 C.F.R. § 50.10 (f)(1-6) or (g)(1-4) as are applicable to the case or matter presented.

In cases or matters under the supervision of other Divisions of the Department of Justice, the appropriate Division should be contacted.

9-13.410 Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients

A. Clearance with the Criminal Division. Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. All such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General for the Criminal Division before they may issue.

B. Preliminary Steps. When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, the Assistant United States Attorney must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. Evaluation of the Request. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division applies the following principles:

- The information sought shall not be protected by a valid claim of privilege.
- All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
- In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.
- In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
- The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

See also the Criminal Resource Manual at 263.

D. Submitting the Request. Requests for authorization are submitted on a standardized form to the Witness Immunity Unit, Office of Enforcement Operations, Criminal Division. (This form, "Request for Authorization To Issue A Subpoena To An Attorney for Information Relating To Representation of A Client," is set out in the Criminal Resource Manual at 264). When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena *duces tecum* must accompany the completed form.

The completed form and draft subpoena may be mailed to the Witness Immunity Unit, 1001 G Street, N.W., Room 945 West, Washington, D.C. 20001, or faxed to (202) 514-1468. Because of the sensitive nature of these requests, the Witness Immunity Unit will not accept completed forms and draft subpoenas over e-mail. The Witness Immunity Unit will respond to questions concerning attorney subpoenas by telephone, (202) 514-5541.

E. No Rights Created by Guidelines. These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

9-13.420 Searches of Premises of Subject Attorneys'

NOTE: For purposes of this policy only, "subject" includes an attorney who is a "suspect, subject or target," or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime. This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. Search warrants for "documentary materials" held by an attorney who is a "disinterested third party" (that is, any attorney who is not a subject) are governed by 28 C.F.R. 59.4 and USAM 9-19.221 *et seq*. *See also* 42 U.S.C. Section 2000aa-11(a)(3).

There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients. Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. Therefore, the following guidelines should be followed with respect to such searches:

A. Alternatives to Search Warrants. In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

NOTE: Prior approval must be obtained from the Assistant Attorney General for the Criminal Division to issue a subpoena to an attorney relating to the representation of a client. *See* USAM 9-13.410.

B. Authorization by United States Attorney or Assistant Attorney General. No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General. Ordinarily, authorization of an application for such a search warrant is appropriate

when there is a strong need for the information or material and less intrusive means have been considered and rejected.

C. Prior Consultation. In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division.

NOTE: Attorneys are encouraged to consult with the Criminal Division as early as possible regarding a possible search of an attorney's office. Telephone No. (202) 514-5541; Fax No. (202) 514-1468.

To facilitate the consultation, the prosecutor should submit the attached form (*see* Criminal Resource Manual at 265) containing relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not "tainted" by any privileged material inadvertently seized during the search. This information should be submitted to the Criminal Division through the Office of Enforcement Operations. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.

If exigent circumstances prevent such prior consultation, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.

The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.

D. Safeguarding Procedures and Contents of the Affidavit. Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.

E. Conducting the Search. The search warrant should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies.

While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation.

Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

The affidavit in support of the search warrant may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated.

If it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in *Federal Guidelines for Searching and Seizing Computers* (July 1994), published by the Criminal Division Office of Professional Training and Development.

F. Review Procedures. The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.

- Who will conduct the review, i.e., a privilege team, a judicial officer, or a special master.
- Whether all documents will be submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege.
- Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
- Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

See the Criminal Resource Manual at 265, for an attorney office search warrant form.

9-13.500 International Legal Assistance

The Criminal Division's Office of International Affairs (514-0000) must be consulted before contacting any foreign or State Department official in matters relating to extradition of a fugitive or the obtaining of evidence in a criminal investigation or prosecution.

Any proposed contact with persons, other than United States investigative agents, in a foreign country for the purpose of obtaining the extradition of a fugitive or evidence should first be discussed with the Office of International Affairs, Criminal Division.

Before attempting to do any act outside the United States relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail, prior approval must be obtained from the Office of International Affairs.

See the Criminal Resource Manual at 266, for additional background regarding the Office of International Affairs.

9-13.510 Obtaining Evidence Abroad -- General Considerations

Because virtually every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders as a violation of that sovereignty, contact the Office of International Affairs initially to evaluate methods for securing assistance from abroad and to select an appropriate one. *See* the Criminal Resource Manual at 267 et seq.

9-13.512 Intended Use of the Evidence

When a country grants assistance for a particular purpose, contact the Office of International Affairs (OIA) before using it for a different purpose. OIA will determine whether it can be used for a different purpose without the express permission of the country that provided it and, if not, for guidance in securing such permission. *See* the Criminal Resource Manual at 269.

9-13.514 Time Required

Contact the Office of International Affairs as soon as it appears that assistance from overseas will be needed. *See* the Criminal Resource Manual at 271-272.

9-13.516 Cost of Obtaining Evidence

Be sure funds are available before making a costly request. *See* the Criminal Resource Manual at 273.

9-13.520 Methods of Obtaining Evidence from Abroad

There are many different methods of obtaining evidence from abroad, including the use of letters rogatory, treaty requests, executive agreements and memoranda of understanding, subpoenas (*see* USAM 9-13.525), and other informal means. Contact the Office of International Affairs before choosing a method. *See* the Criminal Resource Manual at 274-279.

9-13.525 Subpoenas

Since the use of unilateral compulsory measures can adversely affect United States law enforcement relationship with a foreign country, all Federal prosecutors must obtain written approval through the Office of International Affairs (OIA) before issuing any subpoenas to persons or entities in the United States for records located abroad. See the Criminal Resource Manual at 279, for a description of the requirements of requesting such approval. OIA must also be consulted prior to initiating enforcement proceedings relating to such subpoenas.

OIA's approval must be obtained prior to serving a subpoena ad testificandum on an officer of, or attorney for, a foreign bank or corporation who is temporarily in or passing through the United States when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation.

9-13.526 Forfeiture of Assets Located in Foreign Countries

International and domestic coordination are needed in matters relating to the forfeiture of assets located in foreign countries. *See* the Criminal Resource Manual at 280. Consequently, any attorney for the Federal government who plans to file a civil forfeiture action for assets located in another country pursuant to 28 U.S.C. § 1355(b)(2) is directed to notify the Office of International Affairs (OIA) of the Criminal Division

before taking such action. Notification to OIA should be in writing and include the information listed in the Criminal Resource Manual at 280.

Within ten days of receipt of such notification, OIA, in consultation with the Asset Forfeiture and Money Laundering Section, will review the notification information, consult with foreign and U.S. authorities as appropriate to the facts and circumstances of the specific proposal, and communicate its findings to the attorney for the Federal government who submitted the notification.

Attorneys for the Federal government are also directed to consult with the OIA before taking steps to present to a foreign government, for enforcement or recognition, any civil or criminal forfeiture order entered in the United States for property located within the foreign jurisdiction.

In cases where it appears that the property in question is likely to be removed, destroyed, or dissipated so as to defeat the possibility of the forfeiture under U.S. law, the attorney for the Federal government may, of course, request the OIA to seek the assistance of the authorities of the foreign government where the property is located in seizing or taking whatever action is necessary and appropriate to preserve the property for forfeiture.

9-13.530 Special Considerations -- Translations

In every case requiring a translation, prosecutors must reach a clear understanding with the Office of International Affairs (OIA) about who will secure the translation and send it overseas. Generally, arrangements for translation must be made and paid for by the United States Attorney's Office. *See* the Criminal Resource Manual at 282.

9-13.534 Foreign Travel by Prosecutors

Foreign travel must be authorized in advance either by the Executive Office for United States Attorneys (EOUSA) (travel involving Assistant United States Attorneys) or by the Office of International Affairs (OIA) (travel involving Departmental prosecutors). EOUSA will not authorize the travel unless the prosecutor has obtained OIA's consent as required in USAM 3-3.210. Prosecutors should contact EOUSA and OIA well in advance of their intended departure date because foreign clearances take time.

9-13.535 Depositions

If an essential witness who is not subject to a subpoena (*see* USAM 9-13.525) is unwilling to come to the United States to testify, the prosecutor may attempt to proceed by means of a deposition. *See* Fed. R. Crim. P. 15 and 18 U.S.C. § 3503. See the Criminal Resource Manual at 285, for additional discussion regarding depositions and for the procedures which should be followed.

9-13.540 Assisting Foreign Prosecutors

To avoid undercutting Departmental policy, when prosecutors receive requests for assistance from foreign prosecutors, prosecutors should discuss all such requests with the Office of International Affairs before executing. *See* the Criminal Resource Manual at 286.

Costs of executing foreign requests (including court reporter's fees) are the responsibility of the country making the request unless an applicable treaty requires the United States to pay; in that event, the United States Attorney's Office pays the costs.

9-13.600 Use of Hypnosis

For a discussion of the law relating to the use of hypnosis, see the Criminal Resource Manual at 287-294.

9-13.800 Access to and Disclosure of Financial Records

The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq., governs federal agencies' access to and disclosure of all "financial records" of any "customer" from a "financial institution." This statute sets forth a complex set of procedures which United States Attorneys (along with other federal officials) must follow in obtaining the records covered by the Act. These procedures must be followed by law enforcement officials if they are to obtain records needed in an investigation without alerting the target(s) of that investigation.

For additional information, see the *Treatise on the Right to Financial Privacy Act* in the Criminal Resource Manual at 400, or contact the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations.

9-13.900 Access to and Disclosure of Tax Returns in a Non-tax Criminal Case

Title 26 U.S.C. § 6103 prohibits disclosure of tax returns and tax return information except as specifically provided in § 6103, or other sections of the Code. Among the disclosures authorized are those in 26 U.S.C. § 6103(i) concerning access to returns and return information by certain Department of Justice personnel for use in the investigation and prosecution of federal criminal statutory violations and related civil forfeitures not involving tax administration. The access procedures and use restrictions in such a case are set forth in the Criminal Resource Manual at 501 et seq.

Applications for the ex parte order authorized by this paragraph may be authorized by: the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, a United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a Criminal Division organized crime strike force established pursuant to 28 U.S.C. § 510. It is anticipated that most applications will be authorized by United States Attorneys or Strike Force Chiefs.

It is the Department's policy that an Ex Parte Application For Returns and Return Information be filed under seal. Prosecutors should file the motion to seal simultaneously with the Application. The motion should request the court to seal the application and its order granting or denying the application. United States Attorneys should notify Internal Revenue Service whenever a motion to seal is granted, and whenever the records are subsequently unsealed.